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ALEXANDER L. STEVAS,

No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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Dated:
December 2, 1982

QUESTIONS PRESENTED FOR REVIEW

1. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees for tortious conduct occurring during a labor dispute unless the employer can demonstrate, to the satisfaction of an NLRB administrative law judge, that his suit has substantive merit and is not tainted by improper motivation?

2. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees when the suit is not based upon employee resort to the Board or upon issues pending before the Board or subject to Board jurisdiction?

Petitioner, Bill Johnson's Restaurants, Inc., has no parent, subsidiary or affiliate companies.

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The opinion of the Ninth Circuit Court of Appeals was reported at 660 F.2d 1335. The decision of the National Labor Relations Board was reported at 249 N.L.R.B. 155. A copy of each opinion appears in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 12, 1981. A petition for rehearing *en banc* was denied on March 2, 1982. A timely Petition for a Writ of Certiorari was filed with this Court on May 28, 1982, and was granted on October 18, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment. The statutes involved are: 28 U.S.C. § 2283 (1976), 29 U.S.C. §§ 158(a)(1) and (4) (1976), and 29 U.S.C § 160(j) (1976). The text of the constitutional provision and of the statutes involved is set forth in the Appendix hereto.

STATEMENT OF THE CASE

On August 8, 1978, Bill Johnson's Restaurants, Inc. (hereinafter "the Restaurant") discharged Ruth Helton, one of its waitresses. She then filed a charge with the National Labor Relations Board (hereinafter "the Board" or "the NLRB"), claiming that she had been discharged for engaging in union organizational activity. On September 20, 1978, the NLRB Regional Director issued a complaint in Case No. 28-CA-4970, alleging that Helton's termination constituted an unfair labor practice under Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter "the Act" or "the NLRA"), 29 U.S.C. §§ 158(a)(1), (3) (1976).

On that same day, Ruth Helton, together with her husband and other friends and supporters, began a series of demonstrations in

front of the Restaurant, carrying picket signs generally critical of management. [Jt. App. 76.][1] Picketing continued on September 21 and 22, 1978. [*Id.* at 78.] At various times on these days, the number of demonstrators included seven adults and two children. [Pet. App. A-5.] The Restaurant is located in a heavily-traveled section of Phoenix, and there are seats for 250 persons and parking spaces for 119 cars. [Tr. 726-28.]

At the beginning of the demonstrations, the group walked back and forth across the Restaurant's driveways, but they stopped crossing the driveways after a confrontation with one of the managers. [Pet. App. A-32.] Throughout the demonstrations, however, there were occasions when a temporary blockage of the driveways would occur as customers stopped their vehicles to talk with or listen to the demonstrators. [Jt. App. 76-77, 96-97.] At least one customer became involved in an argument with the group, and insulting remarks were exchanged. [*Id.* at 78; Tr. 277.]

On September 22, 1978, the demonstrators distributed leaflets to Restaurant customers and passersby, asserting, among other things, that the Board had issued a complaint against the Restaurant for unfair labor practices, that Ruth Helton had been discharged because of her union activity, and that waitresses at the Restaurant were denied proper overtime pay, were subjected to "unwarranted sexual advances" and were compelled to use a "filthy restroom . . . with no soap, paper towels or toilet tissue provided." [Pet. App. A-34 to A-35; Jt. App. 2.]

On September 25, 1978, the Restaurant filed a verified Complaint in the Maricopa County Superior Court, State of Arizona, alleging that the demonstrators had unlawfully interfered with the Restaurant's business operations, published libelous statements in their leaflet, and created a threat to public safety. [Jt. App. 3-9.]

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[1]The parties' consecutively-paginated Joint Appendix shall be cited as "Jt. App." The Appendix to the Petition for a Writ of Certiorari, containing the decisions of the Administrative Law Judge, the NLRB, and the Court of Appeals, shall be cited as "Pet. App." The documents included in the Appendix to Petitioner's Brief shall be cited as "Br. App." References to the transcript of hearing before the ALJ, where not found in the Joint Appendix, shall appear as "Tr."

The Restaurant's three male co-owners perceived the sexual harassment allegation as a personal attack and joined the civil suit as named plaintiffs. [Jt. App. 109.] The cause of action for libel alleged that the defendants had published false statements "knowing them to be false or in reckless disregard of whether they were false," that the statements "have caused injury to the plaintiffs' business," and that the statements "have impeached the honesty, integrity and reputation of the individual plaintiffs." [Jt. App. 6-7.] The Complaint sought (a) an injunction against mass picketing (but not all picketing), violence, trespass, and obstruction of Restaurant driveways, (b) an injunction against the continued publication of libelous statements, and (c) compensation for the damages suffered as a result of these unlawful acts. The Complaint included a request for a temporary restraining order. [Jt. App. 7-8.]

The case was assigned to the Honorable Marilyn Riddel, who, on September 25, 1978, heard testimony from three of the defendants on the allegations of the Complaint. [Jt. App. 94-95.] Upon the completion of the hearing, the Judge issued a temporary restraining order, prohibiting the demonstrators from trespass, violence or threats of violence, interference with customer access to the Restaurant, and the use of more than four demonstrators in front of the Restaurant; however, she refused to enjoin the alleged libel. [Jt. App. 19-22.] Judge Riddel also signed orders (a) setting October 5, 1978, as the date for a hearing on the Restaurant's application for a preliminary injunction, and (b) allowing expedited discovery in preparation for such hearing. [Pet App. A-6, A-36.]

On the following day, September 26, 1978, Helton filed a second charge with the Board, alleging that the Restaurant's suit had been instituted in order to harass and coerce employees because of their union activities. That same day, counsel for the Restaurant advised counsel for the demonstrators that his depositions scheduled to be taken in connection with the preliminary injunction motion would include questions on the deponents' knowledge of the truth or falsity of the statements in the leaflet, including the assertion that Helton had been fired for union activity. [Pet. App. A-36 to A-37; Jt. App. 57.] On September 28, 1978, the defendants in the state court action filed a motion for a protective order seeking to limit the scope of examination at their depositions. [Jt. App. 23-31.] After a hearing, Judge Riddel ruled that the Restaurant could ask

questions "regarding the statements made publicly in Maricopa County, and the basis for those statements," but could not inquire into any statements made to NLRB investigators.[2] [Jt. App. 39.] The Restaurant then took depositions on September 29 and October 2, 1978, eliciting facts regarding the deponents' conduct during the demonstrations and probing the factual bases for the statements in the leaflet. [Pet. App. A-6.] The defendants in turn deposed several Restaurant officials. [Jt. App. 65-66.]

Helton's second NLRB charge was thereafter amended on October 3, 1978, to include an allegation that the lawsuit had been instituted because she had previously filed a charge with the Board and because she and her supporters had given testimony to the Board. On October 23, 1978, the Board issued a Complaint in Case No. 28-CA-5041, alleging, *inter alia*, that the Restaurant's filing and prosecution of its civil lawsuit (1) violated Section 8(a)(1) of the Act because it interfered with, restrained and coerced employees in the exercise of their rights under the Act, and (2) violated Section 8(a)(4) of the Act because it discriminated against employees for filing charges or giving testimony to the Board.

On October 27, 1978, the Regional Director, acting under authority of Section 10(j) of the NLRA, 29 U.S.C. § 160(j) (1976), filed a petition for injunctive relief in the United States District Court for the District of Arizona, Civil No. 78-830-PHX-WEC. The petition alleged that the state court action filed by the Restaurant was coercive, was intended to impede employee access to the Board, and was filed in retaliation for employee participation in protected activities. The Regional Director requested an order requiring the Restaurant to withdraw its state suit. Following a hearing on November 1, 1978, District Judge Walter E. Craig announced that he would deny the Board's petition. Thereafter, Judge Craig entered a formal order denying the General Counsel's request for an injunction and specifically finding: (1) that the NLRB had no reason-

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[2]Just before issuing her order, Judge Riddel asked counsel for the demonstrators if his clients would be willing to cease, until completion of the Board's proceedings, their public (non-Board) statements that Ruth Helton had been discharged for union activity. The defendants declined to provide such assurances. [Jt. App. 38-39.]

able cause to believe that the Restaurant had filed its state court action for a coercive or discriminatory purpose or intended to interfere with NLRB processes, and (2) that the Restaurant's lawsuit demonstrated, on its face, that it was filed for lawful objectives. [Br. App. "C".]

On November 13, 1978, the defendants in the state court proceeding filed counterclaims alleging abuse of process, malicious prosecution, wrongful injunction, libel and slander. [Jt. App. 40-51.] The following month, hearings on the two NLRB Complaints were held before an Administrative Law Judge (hereinafter "the ALJ"). While the ALJ was considering his decision, the parties in the state court suit cross-moved for summary judgment. On March 15, 1979, the state court judge issued an order dismissing the Restaurant's cause of action for business interference and the defendants' counterclaim for abuse of process, but leaving the parties' libel claims for trial. [Br. App. "D".]

On September 27, 1979, the ALJ rendered his decision, ruling that Helton had been discharged for her union activities, and that the Restaurant's suit had been motivated by a desire to coerce and intimidate employees engaged in protected activity, in violation of Sections 8(a)(1) and (4) of the Act. His conclusion regarding the motivation for the lawsuit was based upon his finding that the suit lacked "a reasonable basis" and that two managers had made general threats on the first day of picketing. [Pet. App. A-39 to A-42.] His order required the Restaurant to withdraw the Complaint it had filed in state court, and to reimburse the defendants for all legal expenses incurred in the suit, including expenses incurred in the prosecution of their counterclaims. [Pet. App. A-53 to A-57.]

The Restaurant thereafter submitted to the NLRB numerous exceptions to the ALJ's ruling. On April 30, 1980, the NLRB affirmed the ALJ's ruling with only minor modifications. [Pet. App. A-14 to A-18.] On May 20, 1980, the Restaurant petitioned the United States Court of Appeals for the Ninth Circuit to review and set aside the Board order. The NLRB thereafter filed a cross-application for enforcement of its order. Oral argument was held on April 15, 1981. In its decision dated November 12, 1981, the Ninth Circuit ordered enforcement of the Board's order in its entirety. [Pet. App. A-3 to A-13.]

The Ninth Circuit ruled that the Restaurant's civil complaint "had a lawful objective on its face" but that the Board had properly found that the suit "lacked a reasonable basis in fact" and had been "filed in bad faith to retaliate against the picketers." [Pet. App. A-10] Acknowledging that the NLRA "does not of itself preempt state court jurisdiction over actions for libel arising in a labor context," the Ninth Circuit nevertheless held that "since the Board has actually decided the issue, the Board's decision would appear to preempt further action by the state court." [Pet. App. A-12 to A-13.] The Ninth Circuit also held that, even if the state court was not preempted, the Board retained the power to enjoin such an action "when the impropriety of that lawsuit is properly addressed and adjudicated by the Board." [Pet. App. A-13.]

The Restaurant subsequently filed a Petition for Rehearing *en Banc* with the appellate court, which was denied on March 2, 1982. [Jt. App. 1.] The Petition for a Writ of Certiorari followed on May 28, 1982.

SUMMARY OF ARGUMENT

Under the principles of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), states must yield to the primary jurisdiction of the NLRB with respect to activities protected or prohibited by the Act, unless the regulated conduct is of peripheral concern to the Act or involves interests deeply rooted in local feeling and responsibility. States have a compelling interest in maintaining domestic peace and in providing judicial remedies for tortious conduct. Blocking such remedies would create disrespect for the law, encourage the victim to utilize self-help, and increase the potential for violence. The Restaurant's civil action for tortious interference with its business and for malicious libel was not preempted by the NLRA, was not dependent upon issues pending before, or submissible to, the NLRB, and was not directed toward securing relief prohibited by the NLRA. Furthermore, the Board has no expertise in libel or in other torts, and can offer no relief for the personal injury suffered by the tort victim. The appropriate disposition of well-founded, or unfounded, causes of action for tortious conduct lies with the state court, and the Board had no authority to order the withdrawal of the Restaurant's civil action. *Farmer v. United*

Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).

An employer is denied his constitutional guarantee of a jury trial when the NLRB makes factual determinations relative to the employer's civil suit to enforce private rights, and then rules that he must withdraw that suit due to insufficient evidence. *See Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 73 L. Ed. 2d 598 (June 28, 1982). Moreover, requiring an employer to establish to the satisfaction of an administrative law judge that his civil tort action is well-founded and that his motivation for suit is untainted results in conflicts in the functions of the Board and the state court, unduly burdens employer access to the judiciary, and allows persons who commit torts against their employer to avoid judicial process. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

The state court system is able to protect employees from groundless employer litigation, and state courts are better equipped than the NLRB to evaluate the propriety of civil tort actions. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *NLRB v. Boeing Co.*, 412 U.S. 67 (1973). The Board has expressed concern that employer litigation will become a vehicle for improper discovery relevant to pending Board cases, but any such abuses of the discovery process can be regulated by the state courts. In addition, when employer discovery threatens to interfere with Board proceedings, the Board may seek a properly-limited injunction under 29 U.S.C. § 160(j). The Board's interests can be adequately protected without requiring the employer to abandon its state court litigation.

The Restaurant's discovery was relevant and necessary to the issues raised in its civil action. *See Herbert v. Lando*, 441 U.S. 153 (1979). The principle of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), was not violated, because the Restaurant did not seek to discover statements made to the Board, nor the names of Board witnesses. The Board's ruling that state court discovery should be delayed until resolution of related unfair labor practice charges unreasonably restricts an employer's ability to obtain ju-

dicial relief from immediate and irreparable injury caused by tortious conduct.

The Anti-Injunction Act, 28 U.S.C. § 2283, was a bar to the Board's order enjoining the employer's state court proceedings. The issues raised by the employer's civil action were neither pending before nor submissible to the Board. Thus, the Board did not act "in aid of its jurisdiction" or to enforce its preemptive authority. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954).

ARGUMENT

I. THE NLRB EXCEEDS ITS JURISDICTION WHEN IT INTERFERES WITH CIVIL LITIGATION OVER MATTERS DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY.

A. Employer Access To State Courts For The Redress Of Tortious Conduct During A Labor Dispute Has Received Consistent Protection From The Supreme Court.

In its landmark decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court crystalized many years of particularized decisions into a general declaration of "[t]he extent to which the variegated laws of the several States are displaced by a single, uniform, national rule" of labor law. *Id.* at 241. The Court's conclusion was that the states must generally yield to the primary jurisdiction of the NLRB with respect to activities that may be protected by Section 7 of the Act, 29 U.S.C. § 157 (1976), or that may constitute unfair labor practices under Section 8 of the Act, 29 U.S.C. § 158 (1976). 359 U.S. at 244-45. Where, however, "the activity regulated was a merely peripheral concern" of the Act, or where "the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility," the Court determined that it would not, "in the absence of compelling congressional

direction," infer that the states had been deprived of power to act. *Id.* at 243, 244.[3]

Subsequently, the Court has had several opportunities to apply its *Garmon* doctrine, and particularly its significant exceptions, to situations in which one of the parties to a labor dispute has sought state court regulation of conduct occurring during that dispute. One of the most important cases was *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the facts of which are closely analogous to those of the instant case. In *Linn*, an official of the employer filed a $1,000,000 libel action against a union, two of its officers, and a company employee, following the distribution of an allegedly defamatory leaflet during a union organizing campaign. The suit was filed in federal district court based on diversity of citizenship. Prior to institution of that action, the company had also filed unfair labor practice charges with the NLRB, asserting that distribution of the leaflet had restrained and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). 383 U.S. at 55-57.[4] Notwithstanding that the defendants' conduct was arguably an unfair labor practice, this Court held that " 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances." *Id.* at 61. Furthermore, the "State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*." *Id.* at 62. No conflict with NLRB jurisdiction was found likely, because the Board's concern lay in whether publication of the statements improperly interfered

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[3]Prior to *Garmon*, the Court had made *ad hoc* exceptions to the preemption doctrine whenever local interests were deemed superior to federal interests. *See, e.g., United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (interference with business); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 748 (1942) (mass picketing). The history of the *Garmon* doctrine was summarized in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290-91 (1971), and in *Lodge 76, IAMAW v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 138-39 (1976).

[4]A lawsuit and an unfair labor practice charge are not the employer's only recourse when defamatory statements are published by employees. He also has the right to prohibit the publication of such statements on his premises, and to discharge the offending employee. *See NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953); *Montefiore Hosp. & Medical Center v. NLRB*, 621 F.2d 510, 516-17 (2d Cir. 1980); *Timpte, Inc. v. NLRB*, 590 F.2d 871 (10th Cir. 1979); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950).

with a representation election, while the trial court's interest lay only in compensating one who had suffered personal injury due to such publication. *Id.* at 63-64. Indeed, the separate and independent, but related, concerns of the two forums made it likely that concurrent jurisdiction would be exercised in many cases in which allegedly defamatory statements were published during labor disputes.[5]

In *Linn*, the Court recognized that allowing libel suits during labor disputes did create a potential for abuse: such suits might restrain the free speech envisioned by the Act, and they might become "weapons of economic coercion." 383 U.S. at 64. To counter such potential abuse, the Court established the following standards for the state courts to follow in such cases:

(1) The plaintiff must prove that the defamatory statement was

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[5]State appellate courts generally have held that trial courts should proceed to try civil complaints based on trespass, mass picketing, or defamation despite the existence of related NLRB proceedings. *See, e.g., Hotel Employees Union, Local 681 v. Anaheim Operating, Inc.*, 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978), *cert. denied*, 440 U.S. 914 (1979); *May Dep't Stores Co. v. Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976); *Mooi Roofing Co. v. De Young*, 9 Mich. App. 295, 156 N.W.2d 617 (1967); *State ex rel. Retail Store Employees Union Local 655 v. Black*, 603 S.W.2d 676 (Mo. Ct. App. 1980); *Dazzo v. Meyers*, 83 A.D.2d 14, 443 N.Y.S.2d 245 (1981); *Lawson Milk Co. v. Retail Clerks Union, Local 698*, 59 Ohio App. 2d 207, 394 N.E.2d 312 (1977); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964). The reason for proceeding in these cases was well stated by the Illinois Supreme Court in the *May Dep't Stores* case:

> We do not consider the mere filing of a charge by the union to be sufficient to divest the State courts of the jurisdiction which otherwise results from the exceptions listed in *Garmon*. The fact that a charge is on file does not remove the compelling interests which justify the existence of State jurisdiction. The imminent threat of violence occasioned by an unauthorized trespass is not rendered less immediate by simply filing an unfair labor practice charge, nor is the State's interest in preventing violence any less significant. As a practical matter, [if the ruling were otherwise] a union could then unilaterally divest the court of jurisdiction by the mere filing of a charge regardless of its merit. We accordingly conclude that the filing of the unfair labor practice charge in the present case did not affect the jurisdiction of the circuit court.

355 N.E.2d at 11.

circulated with malice, which the Court defined to mean publication with knowledge of the statement's falsity or with reckless disregard of whether it was true or false;

(2) The plaintiff must prove the harm resulting from the statement, including injury to reputation, mental suffering, and pecuniary loss; and

(3) The trial judge must not allow excessive damage awards. 383 U.S. at 64-66.[6]

The Court continued to define precisely what conduct remained subject to state court scrutiny during a labor dispute in *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977). In that case, the plaintiff brought a state court action for intentional infliction of emotional distress, alleging that the union had engaged in outrageous and tortious conduct against him, partially through the discriminatory implementation of its hiring hall obligations. Although some of the plaintiff's allegations, if proven before the NLRB, would have established unfair labor practices, the Court, in a unanimous decision, ruled that the "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the state in protecting its citizens." *Id.* at 304.[7] In order to limit such interference, however, the Court emphasized that the civil suit and any remedies must be strictly limited to the tortious

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[6]The Court reconfirmed *Linn* eight years later in another defamation case, *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), but reversed verdicts for the plaintiffs because the trial court had failed to define "malice" properly and because the objectionable accusation ("scab") was not libelous as a matter of law. The Arizona Court of Appeals demonstrated its understanding of, and adherence to, the *Linn* and *Austin* principles in *Ross v. Duke*, 116 Ariz. 298, 569 P.2d 240 (Ct. App. 1976) (defamation suit against union official fails because plaintiff unable to satisfy Supreme Court's "malice" standard). *See also Eden Park Health Services v. Ottley*, 87 A.D.2d 967, 451 N.Y.S. 2d 250, 251 (1982); *Community Medical Services v. Local 2665, AFSCME*, 292 Pa. Super. 238, 437 A.2d 23, 29 (1981); *Jeu v. Retail Clerk's Union, Local 455*, 589 S.W.2d 496, 497-98 (Tex. Civ. App. 1979).

[7]*See also New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979) (state unemployment compensation for strikers not preempted despite significant impact on labor relations).

conduct rather than based upon the NLRA violations. *Id.* at 305-07.

One year later, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), this Court held that an employer's civil suit for trespass against a picketing union was not preempted by the NLRA, even though the union's conduct was arguably protected by the Act. *Id.* at 199-201. The Court ruled that permitting state courts to evaluate whether trespassory picketing was lawful, when the participation of the NLRB has not been invoked, "does not create an unacceptable risk of interference" with protected conduct, because "trespass is far more likely to be unprotected than protected." *Id.* at 205. The Court also noted that one of the factors historically justifying an exception to the *Garmon* doctrine was that "the conduct giving rise to the state cause of action (e.g., violence, libel, or intentional infliction of emotional distress), if proved, would not be protected by § 7 of the NLRA, and therefore there existed no risk that state regulation of the conduct *alleged in the complaint* would result in prohibition of conduct protected by the federal Act." *Id.* at 196 n.25 (emphasis in original).

This well-entrenched line of Supreme Court cases is grounded upon the following two fundamental principles: (1) in our system of federalism, the compelling state interest in the maintenance of domestic peace will not be overridden in the absence of clearly expressed congressional direction,[8] and (2) restrictions upon citizen access to the courts to redress actionable wrongs would create disrespect for the law, encourage the victim to utilize direct self-help, and increase the potential for violence.[9]

Based on these important principles, the authority of the NLRB

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[8]*See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

[9]*See Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 64 n.6 (1966). In *Lodge 76, IAMAW v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court cited "our consistent recognition of the power of the states to regulate conduct physically injuring or threatening injury to persons or property." *Id.* at 151 n.13.

to restrain state court proceedings has been historically limited to the following circumstances:

(1) When the state cause of action is preempted by the NLRA. *See, e.g., NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

(2) When the state cause of action depends upon issues then pending before the Board. *See, e.g., Capital Service, Inc. v. NLRB*, 347 U.S. 501, 504 (1954).

(3) When the state cause of action is directed toward relief made unlawful by the NLRA. *See, e.g., NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972).

(4) When the state cause of action is based upon or would restrict employee access to the Board. *See, e.g., United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981).

In these circumstances, there is generally sufficient federal regulatory interest to warrant NLRB action. When the circumstances described above do not exist, the interest of the state in resolving disputes between and among its citizens assumes paramount importance, even when there is "some risk that the state cause of action . . . will touch on an area of primary federal concern." *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 303 (1977).

B. The NLRB Has, Until Now, Adhered To Supreme Court Standards Governing Employer Access To State Courts.

In view of the important principles discussed above, and this Court's consistent refusal, in the absence of direct and substantial interference with national labor policy, to deprive state courts of jurisdiction over tortious conduct, it would be troublesome indeed if the NLRB were to declare itself authorized to examine the *merits* of the plaintiff's civil action and his underlying *motivation* for such litigation in order to determine whether it could be maintained in the state court. *But that is precisely what has now happened.* Furthermore, the Board's present policy is not the culmination of several years of case-by-case maturation, but instead is a sudden and radical

departure from an approach consistently followed for more than twenty years.[10]

In the pivotal case of *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960), the Board declared that it would not interfere with an employer's right to sue his employees in state court even though that suit was "part of a bad-faith scheme to defeat union organization."[11] Eleven years later, in *United Aircraft Corp.*, 192 N.L.R.B. 382, 384 (1971), *modified*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976), the Board reconfirmed the *Clyde Taylor* rule that "the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." This rule was deemed so important by the Board that it was applied even in cases where employers sought state court relief from lawful, peaceful picketing. *See Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 729, *enforcement denied on other grounds*, 633 F.2d 18 (6th Cir. 1980). In one of those picketing cases, *Frank Visceglia*, 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds*, 498 F.2d 43 (3d Cir. 1974), the Board articulated the principle as follows:

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[10]In the present case, the Board itself offered no explanation for such a sharp reversal, having contributed nothing to this new development beyond the standard short-form adoption of the Administrative Law Judge's opinion. [Pet. App. A-14 to A-16.]

[11]In *Clyde Taylor*, 127 N.L.R.B. at 109, the Board specifically overruled a prior decision and adopted the dissent, which stated:

> I would not find that by seeking relief through the duly constituted courts of the State of Texas, the Respondent violated Section 8(a)(1) of the Act. It may well be that, in granting such relief, a court would be acting inconsistently with governing Federal law, and, indeed, that *the Respondent's motive in seeking it here was to interfere with its employees' rights*. Nevertheless, it seems to me that this Board should accommodate its enforcement of the statute to the traditional right of all to bring their contentions to the attention of a judicial forum, rather than hold it to be an unfair labor practice for them to attempt to do so.

W.T. Carter & Bro., 90 N.L.R.B. 2020, 2029 (1950) (Herzog, Chmn., dissenting in part) (emphasis added).

> The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right.

Over the years, however, exceptions to this important principle were recognized where the object of the litigation was itself unlawful. *See Booster Lodge 405, IAMAW v. NLRB*, 412 U.S. 84 (1973) (union suit to collect coercive fines from members); *United Credit Bureau of America, Inc.*, 242 N.L.R.B. 921 (1979), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981) (suit for damages based on employee's resort to NLRB); *United Stanford Employees, Local 680*, 232 N.L.R.B. 326 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979) (suit to enforce illegal union membership rule). But in these cases the Board focused upon the plaintiff's declared objective for suit, as stated in the complaint, not upon his perceived ulterior motive. Thus, in *Television Wisconsin, Inc.*; 224 N.L.R.B. 722, 722 n.2 (1976), the Board held that a union's lawsuit (to enforce coercive fines) was improper "not because of the Union's subjective intent but because of the unlawful objective sought by the Union."

Until the instant case, the Board had restrained itself from intruding unnecessarily into the parties' civil litigation. For example, in *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), the Board ruled that no unfair labor practice had been committed by an employer who had filed a $50,000 libel suit against an employee, despite a finding that the employer *knew* there was no basis to the libel claim. *Id.* at 79. The Board's restraint often came in the face of obvious burdens placed on protected employee conduct by civil suits. As one appellate court observed:

> Since *Clyde Taylor*, the Board consistently has held that, *despite the coercive effect upon employees' statutory rights*, the filing of a civil suit by an employer or by a union cannot be found to be an unfair labor practice.

Bergman v. NLRB, 577 F.2d 100, 103 (9th Cir. 1978) (emphasis added). *See also Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976):

> But even if we assume that the company was improperly motivated . . . this alone would not make resort to the

courts unlawful so as to justify an unfair labor practice finding.

As the above citations indicate, the Board's traditional approach has been consistently approved by the appellate courts. *See, e.g., In re Sewell*, 95 Lab. Cas. (CCH) ¶ 13,801 (4th Cir. Sept. 29, 1982) (tort suit based on employer's refusal to bargain with certified union is preempted by NLRA). One notable exception is the Seventh Circuit's decision in *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979), *denying enforcement to* 239 N.L.R.B. 445 (1978). In that case, the company brought a civil action, alleging harassment, against an employee who had filed charges against it with the NLRB and with the Occupational Safety and Health Administration. The Board found that the suit had no "reasonable basis" and concluded that it had been filed to penalize the employee for resorting to the Board. 239 N.L.R.B. at 450. The Seventh Circuit refused to enforce the Board's order that the suit be withdrawn, because it found that the suit did have a "reasonable basis" — and thus did not constitute an unfair labor practice — by virtue of the fact that the defendant employee had a history of filing baseless charges against other employers and labor organizations. In reaching its decision, the appellate court did not examine the employer's motives for suit and did not determine whether a good cause of action had been stated, or was provable, under state law.

Perhaps the Board is correct that a substantial burden is properly placed upon the employer whose civil suit is premised on employee resort to NLRB procedures, and that the Board's substantial interest in protecting such resort justifies its review of the civil action. Application of a "reasonable basis" test in such circumstances may be perfectly appropriate. On the other hand, a less substantial burden should certainly exist where — as here — the suit is premised upon conduct *unrelated* to Board proceedings and well within the spectrum of situations historically recognized by this Court as appropriate for state court resolution. *See, e.g., Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (libel); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942) (mass picketing).

With respect to that latter class of lawsuits, the propriety of the suit under state law, the evaluation of its merits, and the appropriate disposition of well-founded, or unfounded, causes of action

should be consigned to the state court. The Board has no authority to determine whether such a suit has a "reasonable basis," because the Board has no interest to protect that will not be properly and adequately protected by the state court. Where the Board's action amounts, "not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it," then this Court must intervene. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 499 (1960). In such cases, "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965). *See also Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

C. The NLRB Cannot, By Deciding An Issue Over Which It Has No Jurisdiction, Preempt Proceedings In A State Court Which Does Have Jurisdiction.

In the present case, the Ninth Circuit recognized that "the state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations," but the court also held that, when "the Board has actually decided the [libel] issue, . . . the Board's decision would appear to preempt further action by the state court." [Pet. App. A-13.] The Ninth Circuit's circular analysis, founded upon the erroneous premise that the Board must make "the same determination" as the trial court [*id.*], has the result, at one and the same time, of depriving a state court of jurisdiction it may lawfully exercise and of granting to the NLRB jurisdiction Congress never intended it to have.

When defamation during a labor dispute is alleged, the role of the NLRB is limited to determining what impact, if any, the defamatory statement could have on employee or employer rights. *Linn*, 383 U.S. at 63. Whether the statement could be the basis of a civil cause of action is irrelevant to that determination. *See Jacobs Transfer, Inc.*, 201 N.L.R.B. 210, 219 (1973). As this Court pointed out in *Linn*, the Board has no direct relief to offer to the defamed individual:

> The injury that the statement might cause to an indi-

> vidual's reputation — whether he be an employer or union official — has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.

383 U.S. at 63-64. Moreover, the very inability of the Board to remedy personal defamation increases the importance of a state judicial forum being available:

> The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized.

383 U.S. at 64 n.6. Not only do the state courts thus have good *reason* to resolve such disputes, they also have the *expertise*.[12] *See NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973), in which this Court rejected the suggestion that the NLRB was a more appropriate forum than a state court for determining the reasonableness of a union fine:

> Indeed, the expertise required for a determination of reasonableness may well be more evident in a judicial forum

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[12]See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641, 667 (1961):

> Thus, if the statements are, as a matter of state law, defamatory and untrue, an employer should have access to the usual remedies for libel or slander. Nor would this seem to be an appropriate occasion for requiring prior submission of the case to the NLRB. Not only are state courts more accustomed to dealing with such issues than is the Board, but since the very elements of the state cause of action will establish that the conduct is not federally privileged, there is little danger than the effectuation of state policy will destroy a privilege intended to be conferred by federal law.

> that is called upon to assess reasonableness in varying factual contexts than it is in a specialized agency.

Appropriately, the Board has recently confirmed its own unwillingness to evaluate alleged misstatements and misrepresentations during union campaigns. *Midland National Life Insurance Co.*, 263 N.L.R.B. No. 24 (Aug. 4, 1982).

Since the Board has no jurisdiction, no expertise, and no remedial power to bring to bear in a case of malicious libel, and since the state court is the preferred forum for such a dispute, it would seem to follow that the Board's reach would far exceed its grasp if it compelled the plaintiff employer in a libel suit to establish, to the satisfaction of an ALJ, that his suit was well-founded and his motives untainted by coercive intentions. Yet the Ninth Circuit has allowed just such an extension of the Board's power, on the theory that the Board assumes preemptive jurisdiction of a libel claim once an unfair labor practice charge is filed based on that claim. [Pet. App. A-13.]

The Ninth Circuit's conclusion was derived from a suggestion in *Sears* that a "corollary of the Court's reasoning" is that state court jurisdiction is preempted if a union, upon being asked to remove its pickets from the employer's property, files an unfair labor practice charge with the NLRB. 436 U.S. at 209 (Blackmun, J., concurring); *but see id.* at 214 (Powell, J., concurring). However, such a corollary would apply *only* because there are some circumstances in which trespassory picketing is protected, and the Board has jurisdiction to determine whether such circumstances exist. *Id.* at 204. *See Hudgens v. NLRB*, 424 U.S. 507 (1976); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). On the other hand, there are *no* circumstances in which malicious libel is protected (*Linn*, 383 U.S. at 63), and thus state court proceedings cannot be preempted merely by asking the Board to evaluate the merits of an employer's libel suit.[13]

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[13]It was "critical" to the holding in *Sears* that the employer had demanded, before filing suit, that the union cease its trespass, so that the union would not "be deprived of an opportunity to present the protection issue to the agency created by Congress to decide such questions." 436 U.S. at 207 n.44. No such demand is necessary before filing a libel suit, however, because the Board has no similar protection issue to decide.

While acknowledging the jurisdiction of state courts to try actions for malicious libel occurring during labor disputes, the Ninth Circuit also declared that the boundary between state and federal interests will be "hopelessly obscured" if such a libel action is impervious to unfair labor practice charges merely by virtue of the inclusion of allegations of malice in the complaint. [Pet. App. A-13.] In *Linn*, however, this Court specifically addressed the fear that some libel suits "might be used as weapons of coercion," and the Court alleviated that fear by requiring the state court to dismiss the complaint unless the plaintiff can *prove* his allegations of malice. 383 U.S. at 64-65. The impact of the decision below will be to substitute the ALJ for the state court judge as the evaluator of such proof, thereby (1) denying the employer the judicial benefits of a jury, discovery, and strict rules of evidence, as well as the substantive expertise of the civil judge, and (2) denying the state the ability to regulate a matter of particular local concern. The decision below frustrates the mandate of *Linn* by enabling the employee defendant to avoid state court proceedings merely by filing a charge with the NLRB alleging that the suit is coercive.

It is the Ninth Circuit, we submit, which has misunderstood, and "hopelessly obscured," NLRB and state court responsibilities in labor disputes. Under *Linn* and related cases, the NLRB, which does *not* have jurisdiction over libel claims, is *not* required, in deciding if a libel suit constitutes an unfair labor practice, to make "the same determination" as the court in which the suit was filed. The Board need determine only whether the employer's civil action is preempted by the NLRA, seeks relief made unlawful by the NLRA, or would prohibit conduct protected by the NLRA. On the other hand, "the question of whether evidence is sufficient to make out a cause of action created by state law and tried in state courts is a matter for decision by those courts." *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 231 (1974) (union conduct not covered by NLRA; state court has exclusive jurisdiction to determine whether conduct is tortious).

D. The NLRB Has No Jurisdiction To Examine The Motivation Of Parties To Civil Litigation.

In this case, the NLRB asserts the power to examine a plaintiff's motivation for filing suit, and to declare that suit an unfair

labor practice if the motivation is deemed coercive. Furthermore, the Board will evaluate the merits of the employer's civil action as a means of determining his motivation. This broad extension of NLRB power has no foundation in the Act or in Supreme Court precedent. There is not the slightest indication in *Linn, Farmer, Sears,* or in *any* of their progeny that the state's authority to adjudicate civil tort actions arising out of labor disputes is contingent upon the NLRB's favorable evaluation of the plaintiff's motivation.[14] The Board is, to be sure, usually the appropriate forum for scrutiny of employer motivation when the parties' dispute involves allegations of unlawful discriminatory conduct. However, when the dispute, as here, is in civil litigation and involves a matter of significant local concern, the state court is the appropriate forum for resolution of all issues pertaining to that litigation, including motive where relevant.

It would substantially undermine the authority of state courts if their power to hear and determine matters of recognized local concern were subject to the perceptions of administrative law judges or federal agencies regarding the litigants' motives for suit. Indeed, from the earliest days of the NLRA, this Court has sanctioned employer resort to state courts in order to obtain relief from tortious conduct during a labor dispute even where the employer's own unfair labor practices have been pervasive. Thus, in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), the company had clearly interfered with its employees' NLRA rights in several respects, but, when the company was faced with an unprotected sit-down strike in its plant, the Court upheld its right to obtain state court relief and to discharge those strikers, and the Court refused to enforce the Board's order requiring reinstatement. Emphasized throughout the Court's opinion was the principle that the company's access to the judiciary had not been lost merely because it had engaged in unfair labor practices:

But reprehensible as was that conduct of the respondent,

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[14]Sears, for example, might well have filed its trespass action in the hope that it would impede union organizing efforts. The picketing, which had been "peaceful and orderly," became ineffective when, by state court order, it was removed from Sears' property to the public sidewalks. 436 U.S. at 182-83 n.2.

> there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.
>
> As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress.

306 U.S. at 253-54. Elsewhere, the Court emphasized that the Board's power to remedy unfair labor practices through affirmative relief "is broad but it is not unlimited . . . [and] is remedial, not punitive. . . ." *Id.* at 257. The Court went on to state:

> The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct.

Id. at 258.

The case now before the Court suggests the need for a reiteration of the basic principles established in *Fansteel*, because the Board, having ruled that the Restaurant committed unfair labor practices during employee organizational efforts, then proceeded to strip that employer of its normal rights to seek judicial redress for tortious conduct. The Board's action gave the Restaurant's employees virtual immunity from prosecution for such conduct because it occurred during a labor dispute. Since the Ninth Circuit found that "the Restaurant's civil lawsuit had a lawful objective on its face; *i.e.*, the complaint sought relief for alleged wrongs that the state court could remedy" [Pet. App. A-10], it follows that the Board took punitive, rather than remedial, action against the Restaurant by forcing it to withdraw that suit and to compensate the defendants for all their expenses, including expenses incurred in their unsuccessful opposition to the application for a temporary

restraining order, and in their prosecution of unsuccessful counterclaims and an unsuccessful motion for summary judgment.

II. THE NLRB'S INTERFERENCE IN THE PARTIES' CIVIL LITIGATION WAS UNCONSTITUTIONAL, UNJUSTIFIED AND UNNECESSARY.

A. NLRB Intervention In Civil Tort Actions Impedes Employer Access To The Judiciary And Denies Him A Jury Trial.

The management of Bill Johnson's Restaurants was publicly accused of maintaining filthy restrooms and of sexually harassing waitresses. Had those accusations been made by strangers, the Restaurant's civil suit for malicious defamation would have proceeded in normal judicial fashion, with full discovery, pre-trial disclosure of witnesses and documents, strict rules of evidence, trial by jury, and supervision by a civil judge with expertise in state tort law. The fact that the Restaurant's accusers were employees should not operate to deprive the Restaurant of such fundamental judicial procedures.

The right to a jury trial in suits at common law, for example, is preserved by the Seventh Amendment to the United States Constitution. That right is denied when an administrative law judge makes factual determinations resulting in an order that a civil lawsuit must be withdrawn for insufficient evidence. It is true that the NLRB, in its traditional role, does not violate the Seventh Amendment's guarantee of a jury trial merely by performing its fact-finding functions and issuing remedial orders. But that is because the Board is enforcing public, statutory rights, and is adjudicating claims that do not arise under common law. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1936). In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), however, the Court differentiated between fact-finding involving "public" rights, which may be entrusted to an administrative agency without constitutional infringement, and fact-finding involving "private" rights:

> Our prior cases support administrative factfinding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity un-

> der an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.

Id. at 458. By requiring an employer to prove to an administrative law judge that his civil tort action, based on traditional common-law claims, has a reasonable factual basis, at the risk of an order requiring him to withdraw that suit, the NLRB has gone considerably beyond the enforcement of "public rights." Whatever peripheral concern the Board may have in protecting employees from groundless civil suits is far outweighed by the employer's constitutional right to a jury trial in a common-law suit for tortious conduct and by the interest of the state in the unimpeded exercise of its judicial functions. *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 73 L. Ed. 2d 598, 615 (June 28, 1982) (unconstitutional for Bankruptcy Court to adjudicate state-created private rights); *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) (actions for damages to a person or property "are actions at law triable to a jury").

The NLRB now allows the employee defendant in a civil action alleging unprotected tortious conduct to bypass the judicial forum by the simple expedient of charging that the employer plaintiff's lawsuit is an unfair labor practice. At that point, according to the Board, the employer must cease his civil litigation, perhaps for months, and demonstrate that his suit has a reasonable basis and that his motivation is untainted. This procedure threatens to disturb the balance of labor-management rights and economic power established by Congress. An employer who is confronted with mass picketing, trespass, libel, slander, business disparagement, threats of violence or other torts normally subject to state court jurisdiction, may well be reluctant, in the face of the decision below, to seek appropriate and swift state court relief for fear that his legal action will appear to be retaliatory and coercive. Aggravating this fear is the Ninth Circuit's suggestion that an employer's civil suit might be restrainable by the Board merely upon a showing that the suit has a coercive *effect* on Section 7 rights: "We question whether motive should necessarily play a part in determining whether an employer violates section 8(a)(1) by filing a lawsuit, without a reasonable basis in fact, against an employee." [Pet. App. A-10.]

The court's apparent willingness to subject tort litigation to NLRB scrutiny threatens to place a great burden upon an employer's resort to the judicial process, because *all* lawsuits are coercive in nature.

In the instant case, the circumstances confronting the Restaurant by the third day of picketing compelled immediate action. Management did not have the luxury of taking time to precisely evaluate all relevant legal precedent, to determine whether it possessed admissible evidence, to consider possible defenses to its complaint, and to review the nice distinctions between permissible and impermissible business disparagement and picketing. The Restaurant was faced with crowded sidewalks, insulting handbills and a confrontation atmosphere. The pressing issue was whether to tolerate this activity, to engage in self-help, or to ask the state court for whatever judicial relief was available.

It is not significant in this case that the threat of mass picketing "never materialized" [Pet. App. A-10 to A-11], that the Restaurant's application for a preliminary injunction against tortious conduct was denied [*id.* at A-41 to A-42],[15] or that the demonstrators had "a reasonable basis" for the accusations in their leaflet. [*Id.* at A-42.] What should be dispositive is that the threat of mass picketing, the need for a preliminary injunction, and the propriety of the statements in the leaflet raised issues properly subject to state

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[15]The fact that mass picketing "never materialized" was due in large part, we submit, to the issuance of a restraining order five days after the demonstrations began. Furthermore, the fact that a preliminary injunction was deemed unwarranted at the time the motion was heard — some *eight weeks* after the last day of picketing [Jt. App. 52] — did not mean that the restraining order was unnecessary *at the time it was issued*. The Restaurant was not blessed with clairvoyance when it filed its civil complaint and sought injunctive relief to protect its reputation and property. Escalation of the demonstrators' efforts to harm the Restaurant seemed imminent when the complaint was filed. The physical and emotional setting for the picketing — several recently terminated employees, and their friends, demonstrating on a public sidewalk in front of a busy restaurant in a heavily-traveled section of the city [Jt. App. 97-98, 105] — gave management a substantial basis for fearing a threat to private property and public welfare.

court jurisdiction.[16] Congress "did not intend to strain through the filament of the NLRA" allegations of tortious conduct that are not subject to Board adjudication. *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 228 (1974).

The approach taken by the Board in this case may act as an impediment to employer resort to the judiciary, because the employer who carries his burdens of proof in the state court will have won nothing if his evidence fails to persuade the Board's ALJ, and he may suffer the imposition of sanctions for pursuing his civil action. The Board's approach can also produce a confusion of functions and, inevitably, conflicting rulings. Indeed, that is precisely what occurred in the present case. The Restaurant obtained a limited, garden-variety temporary restraining order barring trespass, violence, and interference with customer access [Jt. App. 19-22], after a hearing at which three of the demonstrators testified [*id.* at 94-95], and it then successfully resisted the defendants' motion for summary judgment on its libel claim and obtained a ruling dismissing one of the defendants' counterclaims. [Br. App. "D".] The Board, however, ruled that the lawsuit was without a reasonable

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[16]One of the Restaurant's concerns was that the leaflet's reference to unfair labor practices, plural, immediately above the list of alleged waitress complaints, would mislead readers into believing that the Board was reviewing several charges, not just the single charge filed by Ruth Helton. [Jt. App. 2, 111-12.] The Ninth Circuit seemed to agree with the Restaurant:

> The statements contained in the leaflets were somewhat ambiguous; it was not made clear whether all the picketers' listed complaints (which the administrative law judge found to be factually true) had been made the subject of charges by the NLRB. The restaurant may therefore have believed that the leaflets falsely characterized the NLRB proceedings.

[Pet. App. A-11.] Several courts have held that misrepresenting the nature or scope of an agency investigation can be the basis for a civil libel suit. *See, e.g., Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 818 (N.D. Cal. 1977) (defendant news service allegedly published a story claiming that the Federal Trade Commission had issued a complaint against the plaintiff for several unfair trade practices, when in fact the FTC had not charged the plaintiff with all of the practices mentioned in the story; the court found that a cause of action for libel had been stated); *Championship Sports, Inc. v. Time, Inc.*, 40 Misc. 2d 407, 243 N.Y.S.2d 28, 29-30 (Sup. Ct. 1963); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909, 913 (1968).

basis, and it ordered the employer to withdraw the suit and to pay all fees and expenses incurred by the defendants — even those incurred in opposing the application for a restraining order, in moving for summary judgment, and in prosecuting their counterclaims.[17]

The Ninth Circuit and the Board expressed great concern that an employer's civil suit has an intimidating effect on persons who participate in agency proceedings. [Pet. App. A-12, A-42.] But the defendants in the Restaurant's civil suit exposed themselves to the burden and expense of defending a lawsuit only by their *public* conduct. They could have chosen to place their grievances entirely in the hands of the NLRB, the EEOC, OSHA, or any other appropriate government agencies, and their complaints would have been privileged. *Cf. Todd v. Cox*, 20 Ariz. App. 347, 348, 512 P.2d 1234, 1235 (1973). Indeed, it has been held that an absolute privilege attaches to statements, even defamatory statements, made to a governmental agency. *See EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980), *appeal dismissed*, 652 F.2d 380 (4th Cir. 1981); *Virginia-Carolina Freight Lines, Inc.*, 155 N.L.R.B. 447 (1965). But no such privilege exists where, as in the present case, the defamatory statements are published publicly. *See Skaggs Pay Less Drug Stores*, 189 N.L.R.B. 249, 252 (1971)

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[17]The Board's order regarding reimbursement of the defendants' expenses in the lawsuit raises several troublesome questions regarding the counterclaims. Since the defendants' counterclaims were not necessary to their defense of the Restaurant's complaint, why should the defendants be reimbursed for expenses incurred in connection with such counterclaims, particularly those that are withdrawn or dismissed? In fact, the defendants' counterclaim for defamation, based on statements allegedly made by Restaurant officials at the time of Helton's discharge and during the demonstrations, is still awaiting trial. [Jt. App. 49-50; Br. App. "D".] Does the Board's order require the Restaurant to pay all *future* expenses incurred by the defendants in the prosecution of their counterclaim for defamation, whether or not they are successful? Furthermore, Helton's defamation case arose out of the same labor dispute that gave rise to the Restaurant's defamation action. Should the Restaurant be denied judicial review of its claim while Helton's claim not only receives such review but receives it at the Restaurant's expense? These questions demonstrate, we believe, the confusion resulting from the NLRB's massive and uncontrolled intrusion into the parties' civil litigation.

(lawful for employer to discharge employee for slander spoken during recess in Board hearing).[18]

By choosing to take their complaints public and to proclaim their accusations against the Restaurant on the streets of Phoenix, the demonstrators shed the protective cloak they would have worn by resorting only to the appropriate agencies. Even if some of their activities were protected, the demonstrators had no *carte blanche* to expand their activities into unprotected areas, such as the publication of malicious defamatory statements about the Restaurant's management and staff.[19] Nothing in the NLRA was intended to

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[18]In the case at bar, the Board's deviation from established principles is reflected in the following statement contained in its decision:

> Respondent's lawsuit placed its employees on notice that if any employee files charges with the Board, *or makes public a dispute with the Respondent*, that employee is subjecting himself to the possibility of a lawsuit which will require immediate expense by having to hire private legal counsel to defend against the lawsuit and to face the possibility of having to reimburse the Respondent for legal fees and damages *if the state court upholds the Respondent's claim*.

[Pet. App. A-42; emphasis added.] We would have thought it beyond dispute after *Linn* that an employee who publicly attacks his employer (as opposed to presenting his claims to the appropriate government agency) assumes the risk that the object of his attack will seek judicial vindication, and that, if the court upholds the employer's position, the employee may properly be held liable for damages.

[19]District Judge Craig found that only *unprotected* conduct would be chilled by the Restaurant's civil suit. In denying the Board's application under Section 10(j), 29 U.S.C. § 160(j), for an injunction against the Restaurant's suit, he stated:

> I will issue an Order enjoining the Respondent here to not interfere with the National Labor Relations Board investigations and hearings. If you want that. But I'm certainly not going to enjoin an employer from bringing an action which he believes is a meritorious action for libel.
>
> Now, if that has any chilling effect — and it may have a chilling effect — but the only chilling effect this Court can see is that it may curb the tempers of a few people to the extent that they better be careful to state the truth with respect to what they may assert to be public. And if they fail to state the truth in statements to the public, then in that event, they may be called to account in a court of law.

Transcript of proceedings in *Price v. Bill Johnson's Restaurants, Inc.*, Civ. No. 78-830, D. Ariz., Nov. 1, 1978, pp. 37-38. [Br. App. "B".]

deprive an employer of the right to seek judicial redress, and to fully and effectively prosecute claims, based on the injurious public conduct of persons with whom he has a labor dispute. Indeed, in enacting the 1947 amendments to the Act, Congress declared that labor and management must "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 141(b) (1976). The limitations that the NLRB has now placed on employer access to state courts reflect an effort to intervene in labor-management disputes to an extent never intended by Congress. This Court should continue to reject such efforts. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

B. The Rights Of The State Court Defendants Were Amply Protected By Available Judicial Procedures.

Underlying the drastic relief ordered in this case by the Board and approved by the Ninth Circuit — withdrawal of the Restaurant's civil action and payment of all the defendants' expenses — is the unspoken fear that the judicial system cannot protect the defendants from a groundless suit. Indeed, the Board suggested that the defendants would be entitled to its protection even "if the state court upholds the Respondent's claim." [Pet. App. A-42.] The Board's lack of confidence in the state judicial system has not been shared by this Court. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978), for example, the Court held that "permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference" with conduct that the Board might find to be protected. *See NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973) (NLRB not more appropriate than state court as forum to determine reasonableness of union fine); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (state courts authorized to enforce rights founded upon federal law). *See also Sumner v. Mata*, 449 U.S. 539, 549 (1981) (state courts competent to decide federal constitutional questions).

The lawsuit in dispute here was filed in the Superior Court of Maricopa County, Arizona. That state's judicial rules, like those of

other states, afford substantial protection from unfounded suits. The Arizona Rules of Civil Procedure, for example, which closely track the Federal Rules, provide for the early dismissal of groundless claims. Thus, if a stated cause of action is legally deficient on its face, the trial court is empowered to dismiss the complaint for failure to state a claim upon which relief may be granted. 16 Ariz. Rev. Stat. Ann., R. Civ. P. 12(b)(6) (1973). If the complaint pleads a legally sufficient claim, but the undisputed facts demonstrate that the defendant is entitled to judgment as a matter of law, then the court may grant summary judgment against the plaintiff. 16 Ariz. Rev. Stat. Ann., R. Civ. P. 56 (1973). If the state court determines that the suit "constitutes harassment, is groundless and not made in good faith," then the court can assess attorneys' fees against the plaintiff. 4 Ariz. Rev. Stat. Ann. § 12-341.01(C) (1982).[20] Moreover, a defendant who has been subject to such a suit could in turn bring his own action for malicious prosecution or abuse of process. *See Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 571 (1976).[21] Finally, a defendant who is dissatisfied with trial court rulings may always turn to the appellate process, ending, in appropriate circumstances, with this very Court. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 154-55 (1971) (White, J., dissenting).

In short, there are adequate remedies available in the state

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[20]Other states have equivalent statutes. *See, e.g.*, Cal. Civ. Proc. Code § 128.5 (West Supp. 1982); Fla. Stat. Ann. § 57.105 (West Supp. 1982); Ill. Code Civ. Proc. § 2-611 (1982); Wis. Stat. Ann. § 814.025 (West Supp. 1982-83). The Board expressed concern that the state court defendants would be compelled to incur legal expenses in defending the Restaurant's tort suit. [Pet. App. A-42.] It is true, of course, that legal costs are incurred by all litigants, but the defendants' status as picketers carried with it no special immunity from the financial burdens of the judicial system.

[21]The conditions facing the Restaurant on the third day of picketing, including the growing number of demonstrators and the escalation of their attack by distribution of the offensive leaflets, provided management with probable cause for filing its suit. Under well-established principles developed in malicious prosecution cases and analogous here, the Restaurant's *motivation* for suit should have been immaterial in the face of probable cause. *See Stacey v. Emery*, 97 U.S. 642 (1878); *Stamatiou v. United States Gypsum Co.*, 400 F. Supp. 431, 438 (N.D. Ill. 1975), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); *McClinton v. Rice*, 76 Ariz. 358, 366, 265 P.2d 425, 430-31 (1953).

judicial system to deal with an employer who files a groundless lawsuit. Moreover, it is reasonable to assume that state courts, which regularly evaluate the propriety of civil suits, are far better equipped than the NLRB to determine whether an action is in fact groundless. *See NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973). On some occasions, a state court, misunderstanding the law or the facts, may sustain an employer's civil action that is not worthy of judicial approval, but ousting state courts of jurisdiction in favor of NLRB review of employer suits "seems an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362 (1972).

In the present case, the Court of Appeals and the NLRB both expressed concern that an employer might use state court litigation to circumvent the Board's discovery limitations and thereby interfere with its administration of national labor policy. [Pet. App. A-11, A-43 to A-51.] Such interference would, of course, be possible whether the employer's civil suit were groundless or not. However, this problem can be addressed without the need for a remedy as drastic as a Board order directing an employer to dismiss his state lawsuit. In appropriate circumstances, for example, the trial court may impose limitations on an employer's discovery efforts. See 16 Ariz. Rev. Stat. Ann., R. Civ. P. 26(c) (1973). Furthermore, in Arizona, the party dissatisfied with such limitations may obtain immediate appellate review by means of a "special action." Such interlocutory appeals are appropriate when a lower court determination is "arbitrary and capricious or an abuse of discretion" or when a court exceeds or threatens to exceed its jurisdiction or legal authority. 17A Ariz. Rev. Stat. Ann., R. Proc. for Special Actions, Rule 3 (1973). It is well established in Arizona that discovery rulings are appropriate for review in special actions. *See, e.g., Ingalls v. Superior Court*, 117 Ariz. 448, 449, 573 P.2d 522, 523 (Ct. App. 1977); *Southern Pacific Transportation Co. v. Veliz*, 117 Ariz. 199, 200, 571 P.2d 696, 697 (Ct. App. 1977).[22]

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[22]Interlocutory review procedures equivalent to those found in Arizona are also available in other states for discovery disputes. *See, e.g., Assured Investors Life Ins. Co. v. National Union Assocs.*, 362 So. 2d 228 (Ala. 1978); *Daly v. Superior Court*, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977) (*en*

Additional judicial protection against inappropriate employer discovery may be sought by the NLRB itself, under Section 10(j) of the Act, 29 U.S.C. § 160(j). That statutory provision authorizes the Board, upon issuance of an unfair labor practice complaint, to petition the Federal District Court for "appropriate temporary relief or restraining order." Section 10(j) injunctions are sought by the Board with some frequency,[23] and their objective is often to enjoin an employer from coercing or interrogating his employees. *See, e.g., Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967); *Zipp v. Shenanigans*, 92 Lab. Cas. (CCH) ¶12,921 (C.D. Ill. 1980).

Although the Board should not be permitted to enjoin *all* employer discovery in a libel case against employees, the Board may request a Section 10(j) injunction against particular objectionable inquiries. For example, in the present case, instead of seeking to utilize Section 10(j) to obtain dismissal of the Restaurant's entire lawsuit, the Board might have sought a carefully drawn and specific order from the District Court limiting the scope of the Restaurant's discovery to the extent that it would constitute unlawful interrogation under the Act or would interfere with the pending Board hearing on the Helton discharge.[24] Such an order, if deemed appropriate by the District Court, would have protected the Board's interests, and those of the employee defendants, without prohibiting the Restaurant from conducting its libel action. In short, a more appropriate accommodation of the interests of the employer and of the Board could have been sought below. More significantly, however, as we will

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banc); *Mayer v. District Court*, 198 Colo. 199, 597 P.2d 577 (1979); *Muck v. Claflin*, 197 Kan. 594, 419 P.2d 1017 (1966); *Barker v. Dunham*, 551 S.W. 2d 41 (Tex. 1977). The employee defendants in the Restaurant's civil suit did seek a protective order limiting discovery into their organizational activities. [Jt. App. 23-31.] If they believed that the order subsequently issued by the trial judge was inadequate, they could have utilized the special action procedure to obtain immediate appellate review, but they did not do so.

[23]In fiscal year 1980, the Board filed 50 District Court lawsuits seeking relief under Section 10(j). See 45 NLRB Ann. Rep. 291 (FY 1980). The prior year, the Board had filed 62 such suits. See 44 NLRB Ann. Rep. 315 (FY 1979).

[24]See footnote 19 *supra* and footnote 29 *infra*.

demonstrate, there was nothing improper about the scope or manner of the discovery conducted by the Restaurant.

C. The Prosecution Of The Restaurant's State Court Action, Including The Taking of Deposition Testimony, Did Not Constitute An Unfair Labor Practice.

The Restaurant not only *filed* a civil lawsuit against the demonstrators, it also *prosecuted* that suit, including taking the depositions of several of the demonstrators in preparation for a hearing on its motion for a preliminary injunction. The deposition questions posed by the Restaurant's counsel were relevant to the state court action. They were directed at (a) the unlawful aspects of the demonstrations, such as mass picketing, interference with traffic, and obstruction of customer access, and (b) the truth or falsity of the allegedly libelous statements on the leaflet, including the statement that Ruth Helton was discharged for union activity. The NLRB held that the Restaurant violated Sections 8(a)(1) and (4) of the Act, 29 U.S.C. §§ 158(a)(1), (4), by "threatening to depose, and by deposing the defendants in the State of Arizona civil proceedings. . . ." [Pet. App. A-52.] The Ninth Circuit did not consider the propriety of the depositions alone, because it found that "filing and conducting the libel suit was an unfair labor practice." [Pet. App. A-12 n.2.]

The Board held that the Restaurant's discovery violated the principles established in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), because it provided "advance knowledge of the substance of the General Counsel's case" on the Helton discharge. [Pet. App. A-49.] In *Robbins Tire*, the employer sought to use the provisions of the Freedom of Information Act ["FOIA"], 5 U.S.C. § 552 (1976), to obtain pre-hearing discovery of witness statements given to the Board. The Court held the statements exempt from mandatory disclosure because their production would interfere with enforcement proceedings. 437 U.S. at 239. Any extension of the *Robbins Tire* decision to the facts of this case is wholly unwarranted. *Robbins Tire* involved a question of specific statutory construction — the FOIA is not involved here. Moreover, *Robbins Tire* involved an effort by counsel to discover written witness statements submitted *to the Board* during its administrative investigation — no such effort was made here. [Jt. App. 67-68.] *See Baldridge v. Shapiro*, 71 L.

Ed. 2d 199, 212 (Feb. 24, 1982) (confidential census data, unavailable under FOIA, also unavailable in court discovery).

To the extent that *Robbins Tire* does require an accommodation between the state's interest in preserving the peace and the NLRB's interest in preserving the confidentiality of its investigation, we submit that such an accommodation was reached in this case. In allowing discovery in preparation for the hearing on the preliminary injunction motion, the state judge carefully limited the scope of interrogation: She stated that the Restaurant "may not inquire as to what statements were made to NLRB investigators . . . or who made the statements."[25] [Jt. App. 40.] The Restaurant complied with that limitation. [*Id.* at 68.] Thus, without interfering with the Board's preparation for the imminent unfair labor practice hearing, the employer was allowed to prepare properly for an imminent *judicial* hearing.[26]

Counsel for the Restaurant asked the deponents, all of whom

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[25]The ALJ noted that the Restaurant's counsel had argued to the state court that the Restaurant was entitled to ask "why [Ruth Helton] made the statements to a *public agency* as opposed to some other forum." [Pet. App. A-37; emphasis added.] The argument, as similarly reported in the transcript of the proceedings on the motion for a protective order [Jt. App. 38], was erroneously transcribed. As was made clear by the context of the statement, particularly the preceding paragraph, the Restaurant was asserting a right to inquire into statements made *in the public streets*, not to a public agency. [*Id.*] The Restaurant's counsel never sought to inquire into statements made by Helton or by anyone else to the Board, and Helton's counsel conceded that fact at trial. [*Id.* at 68.]

[26]Some of the responses obtained in the depositions may have been pertinent to the Board proceeding on Helton's discharge, but the important fact is that they were clearly relevant to the state proceeding. We recognize that discovery may be denied when its purpose "is to gather information for use in proceedings other than the pending suit." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978). However, *Sanders* is distinguishable because the discovery requested there was *not* relevant to the issues in that case. *Id.* at 352-53. Furthermore, the discovery sword cuts both ways: counsel for the defendants in the Restaurant's civil action also deposed several management officials. [Jt. App. 65-66.] Some of his questions focused on their knowledge of Helton's union activities, an issue relevant to both the pending Board proceeding and the pending libel action. [*Id.* at 66.] Moreover, at least one of those depositions was used in an attempt to impeach a witness' subsequent NLRB testimony. [*Id.* at 119-24.]

had participated in the public demonstrations, for information about their picketing and their interference with Restaurant operations, and, to a lesser extent, for the facts which supported the accusations in their leaflet, including the statement that Ruth Helton had been fired for suggesting that waitresses at the Restaurant form a union. That such a statement, when uttered publicly, may be the basis for a libel suit was established in *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977).[27] That one may take discovery necessary to *prove* the libel is merely a logical extension of that holding. This Court's ruling in *Linn* imposes a malice test that requires proof of the publisher's state of mind. Denying the plaintiff the discovery tools necessary to carry his burden of proof would be in direct conflict with that case. An analogous situation confronted the Court in *Herbert v. Lando*, 441 U.S. 153 (1979), where the Court held that the constitutional freedoms of speech and press could not be used in a defamation suit to immunize the defendant television producer from discovery into his state of mind and into the editorial process:

> In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some sub-

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[27]A false public accusation that a named individual has committed an unlawful act is generally actionable as libel. *See Broking v. Phoenix Newspapers, Inc.*, 76 Ariz. 334, 337, 264 P.2d 413, 415 (1953).

> stance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity." *New York Times Co. v. Sullivan*, 376 U.S., at 285-286.

441 U.S. at 170. If the Constitution is an insufficient shield from relevant discovery in a libel case, then, *a fortiori*, the mere filing of an unfair labor practice charge should not have provided Ruth Helton with a shield from such discovery.

III. THE ANTI-INJUNCTION ACT BARS THE NLRB FROM ENJOINING CIVIL ACTIONS IN STATE COURTS UNDER THE CIRCUMSTANCES OF THIS CASE.

In 1793, Congress enacted a statute which provided that no "writ of injunction be granted [by a federal court] to stay proceedings in any court of a state. . . ." Act of March 2, 1793; 1 Stat. 335. The rationale behind the statute was the need to preserve "the essentially federal nature of our national government," and the desire to prevent needless friction between the state and federal court systems by clearly delineating the proper boundaries within which each system may function. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285-86 (1970). *See also Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 132 (1941):

> Regardless of the various influences which shaped the [Anti-Injunction Act], the purpose and direction underlying the provision are manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court.

The present version of the 1793 statute was enacted in 1948 as Section 2283 of Title 28 of the United States Code. As the statute currently reads, a federal court may not grant an injunction against state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." In *Atlantic Coast Line Railroad*, this Court emphasized the need to construe these exceptions narrowly:

> [W]e therefore . . . hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction.

398 U.S. at 287. In reaching this conclusion, the Court expressly relied upon the constitutional principle that the states had surrendered only a part of their sovereignty to the federal government. U.S. Const. amend. X. One of the powers reserved by the states was the power to maintain a separate, independent judicial system, free to act unless restrained by the federal Constitution, laws or treaties. 398 U.S. at 285. *Atlantic Coast Line Railroad* involved litigation between two private parties, but the legal principles established therein remain basically intact when it is a governmental agency that seeks or issues the injunction against state judicial proceedings.[28] Thus, other cases, involving review of NLRB injunctions, demonstrate the narrowness of the exceptions to Section 2283.

In *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), for example, an employer had obtained a state court injunction and had filed an unfair labor practice charge against a union, both based upon the same conduct. The Court held that the Board had authority to obtain a District Court injunction against the state proceedings under the exception to Section 2283 for actions "in aid of its jurisdiction." In allowing that injunction, the Court ruled that where a federal agency has "exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right." *Id.* at 504-05.

Later, in *NLRB v. Nash-Finch Co.*, 404 U.S. 38 (1971), this Court, in a 5-2 decision, determined that an implied exception to the broad rule of non-intervention established by Section 2283 also

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[28]Although it was the NLRB that issued the order restraining the Restaurant from proceeding with its state court suit [Pet. App. A-54], that order was only effective when enforced by the Federal Court of Appeals.

existed where the NLRB had acted to preserve its own preemptive jurisdiction. In *Nash-Finch*, the employer had obtained a state court injunction limiting union picketing. The Board then filed suit in Federal District Court, seeking to restrain enforcement of the state court injunction on the ground that it regulated conduct which was governed exclusively by the NLRA.[29] On review, this Court found that the Board's action did not come within the Section 2283 exception for matters "necessary in aid of its jurisdiction," since the Board had not sought to restrain specific activities which were already the subject of a Board complaint. *Id.* at 142. Nevertheless, the Court did affirm the Board's action, holding that the NLRB has implied authority in spite of Section 2283 "to enjoin state action where its federal power pre-empts the field." *Id.* at 144.[30] Such an

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[29]It is significant that the order sought from the District Court by the Board in *Nash-Finch* was not directed at the entire state proceeding instituted by the employer but only at the objectionable aspects of the injunction he had obtained. The Supreme Court noted that the injunction was broadly aimed at peaceful, protected handbilling, picketing and even discussion, and had been issued under a dubious state statute. 404 U.S. at 140-41. The decision of the Eighth Circuit below noted that the Board had sought:

> . . . to restrain the Company from enforcing or attempting to enforce *those parts* of the state court temporary injunction alleged to violate Article VI, Clause 2 (The Supremacy Clause) of the Constitution of the United States because it conflicted with the National Labor Relations Act, and *other parts* of the injunction claimed to restrain peaceful picketing and to be within the area arguably preempted by the National Labor Relations Act.

NLRB v. Nash-Finch Co., 434 F.2d 971, 974 (8th Cir. 1970) (emphasis added).

[30]The dissenters argued for a more restrictive view of Section 2283:

> In light of the congressional disinclination to authorize anything more than extremely limited interferences with state court proceedings by federal courts, and in view of this Court's reluctance to approve such interference by way of the equitable powers of federal courts, *Younger v. Harris*, 401 U.S. 37, 43-45 (1971); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970), implicit exceptions from § 2283 are at best suspect.

404 U.S. at 151 (White, J., dissenting, joined by Brennan, J.). *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975) (federal courts asked to enjoin state proceedings "should abide by standards of restraint that go well beyond those of private equity jurisprudence").

injunction was not appropriate in the case presently at bar, however, because "state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional distress, or obstruction of access to property is not pre-empted by the NLRA." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 204 (1978) (footnotes omitted).[31]

In the present case, the Ninth Circuit held that the Board's cease-and-desist order requiring the Restaurant to withdraw its civil suit was not barred by Section 2283 because the anti-injunction statute "does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction." [Pet. App. A-12.] Thus the Ninth Circuit implicitly found that the second of the three exceptions to the Anti-Injunction Act applied here — that is, that the Board could obtain an injunction against the Restaurant's lawsuit on the ground that the injunction was "necessary in aid of its jurisdiction." We submit, however, that the Board had no jurisdiction to aid by enjoining the Restaurant's civil suit. Although the Court relied upon *Capital Service* and *Nash-Finch*, the subject matter of the state lawsuit — libel, trespass, and improper interference with business — was neither pending before the Board nor subject to its jurisdiction. The only dispute between the parties that was then pending before the Board involved the discharge of Ruth Helton. But the pendency of those charges did not give the demonstrators license to engage in tortious conduct on the streets of Phoenix. *See Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *May Department Stores Co. v. Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976).

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[31]Under *Nash-Finch* and *Capital Service*, the Board may have authority to restrain state court actions which interfere with its proceedings in violation of Section 8(a)(4) of the Act. The Ninth Circuit found that management's threats on the first day of picketing demonstrated a retaliatory motivation for the suit in violation of that section. [Pet. App. A-11 to A-12.] Apparently overlooked by the court, however, was the Board's own finding that there was no evidence that the threats violated Section 8(a)(4). [*Id.* at A-14 n.2] This holding by the Board obviously undermines any conclusion that the motivation for the civil suit, as purportedly revealed by those threats, was to penalize employees for participating in proceedings before the Board.

If the Board was correct in asserting that some aspects of the Restaurant's discovery in the civil suit interfered with the pending Board hearing on the Helton discharge, the agency did have the power to obtain limited injunctive relief "in aid of its jurisdiction" under Section 10(j), 29 U.S.C. § 160(j). But the Board did not have the power to obtain an order requiring withdrawal of the *entire* state court proceeding. The Ninth Circuit erred in holding that the Board has some general power to intervene in labor disputes and to enjoin state court litigation "whether or not the state court's jurisdiction is technically preempted." [Pet. App. A-13.] *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 152 (1971) (White, J., dissenting) ("The Board has no roving, unqualified power to prevent unfair labor practices. . . ."). The NLRB does not have blanket authority to intervene in the relationship between employer and employee whenever it deems that one side has obtained an advantage over the other or is applying painful economic leverage in the relationship. The Board may intervene only when its statutory mandates require that it control the situation. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). If the Restaurant's civil action was groundless, or was otherwise improper, appropriate controls were within the jurisdiction of the state court, not the NLRB.

CONCLUSION

For all the foregoing reasons, Petitioner, Bill Johnson's Restaurants, Inc., respectfully requests that the decision of the Ninth Circuit with respect to the issues raised herein be reversed, and that the case be remanded to that court with instructions to deny enforcement of the Board's order insofar as it relates to the civil lawsuit filed by Petitioner in Maricopa County Superior Court (No. C375470).

Respectfully submitted this 2nd day of December, 1982.

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APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, Amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTES

28 U.S.C. § 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

29 U.S.C. § 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. . . .

29 U.S.C. § 160. Prevention of unfair labor practices.

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate

temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

TRANSCRIPT OF PROCEEDINGS in *Price v. Bill Johnson's Restaurants, Inc.*, Civ. No. 78-830, D. Ariz., Nov. 1, 1978, pp. 37–38.

[Caption deleted]

THE COURT: As I see it, the Court is confronted with two propositions. Number one, is the filing of a State court action for libel as is the case here, an interference with the functions of the National Labor Relations Board under the National Labor Relations Act, and therefor [sic] prohibited?

I will follow the 9th Circuit in the case cited in 577 F.2d, 100, at 103 to the effect that filing a civil action is not a violation of the National Labor Relations Act, in and of itself.

At the same time, the Court is aware of the fact that no employer or an employee can interfere with the operation of the National Labor Relations Board.

Now, those are two fundamental issues. Moreover, this Court is cognizant of the doctrine of abstention between federal and state authority. And I'm not about to enjoin anybody from bringing an action in the State Court of Arizona, unless it shows to me that it is wholly outside of the State jurisdiction, or that it's in direct interference with the Government of the United States. I don't find that here.

I will issue an Order enjoining the Respondent here to not interfere with the National Labor Relations Board investigations and hearings. If you want that. But I'm certainly not going to enjoin an employer from bringing an action which he believes is a meritorious action for libel.

Now, if that has any chilling effect — and it may have a chilling effect — but the only chilling effect this Court can see is that it may curb the tempers of a few people to the extent that they better be careful to state the truth with respect to what they may assert to be public. And if they fail to state the truth in statements to the public, then in that event, they may be called to account in a court of law.

Now you two gentlemen can get together and figure out an Order not inconsistent with what the Court stated.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (As Amended), issued in Civ. No. 78–830, D. Ariz., Jan. 22, 1979.

[Caption deleted]

Milo V. Price, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, having filed a Petition for an injunction pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), and a hearing having been held on November 1, 1978 pursuant to this Court's Order that Respondent show cause why said injunction should not issue, and the Court having fully considered the pleadings, the affidavits, and the legal memoranda filed herein and having heard oral argument of counsel, now therefore,

IT IS HEREBY ORDERED, denying Petitioner's request for an injunction restraining the Respondent from prosecuting the lawsuit filed by it in the Superior Court of the State of Arizona, in and for the County of Maricopa and bearing the title and number Case No. C375470, *Bill Johnson's Restaurants, Inc., et al. v. Helton et al.*, and

IT IS HEREBY ORDERED, denying Petitioner's request for an injunction restraining Respondent from interfering with the National Labor Relations Board's processes, from impeding employee resort to the Board, from interrogating, threatening, or discriminating against employees or former employees because of their protected activities or participation in Board matters, and from restraining or coercing employees in the exercise of their rights as provided in the National Labor Relations Act, and

IT IS FURTHER ORDERED, recognizing that the National Labor Relations Act prohibits employers from engaging in the acts or conduct described in the preceding paragraph, that the National Labor Relations Board may reapply for all just and proper injunctive relief restraining such acts or conduct by Respondent upon a suitable factual showing that such acts or conduct have occurred or are threatened.

The findings of fact and conclusions of law upon which this Order is based are set forth below.

I. FINDINGS OF FACT

1. The Petitioner is the Regional Director of the Twenty-Eighth Region of the National Labor Relations Board ("NLRB"), an agency of the United States.

2. The Respondent, Bill Johnson's Restaurants, Inc., is now, and has been at all times material herein, a corporation duly organized and existing under the laws of the State of Arizona, operating restaurants in Phoenix and Mesa, Arizona, including one at 3757 East Van Buren Street, Phoenix, Arizona.

3. The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act (hereinafter "the Act"), 29 U.S.C. § 151 *et seq*.

4. On August 8, 1978, Respondent discharged Myrland R. Helton from her employment as a waitress at Respondent's restaurant located at 3757 East Van Buren Street (hereinafter "the Restaurant"). The following day Ms. Helton filed a charge with the NLRB claiming that she had been discharged "because of "her union and/or other protected concerted activities" in violation of the Act. On September 20, the NLRB issued a complaint based on Ms. Helton's charge, alleging that her discharge constituted an unfair labor practice under Sections 8(a)(1) and (3) of the Act.

5. On the morning of September 20, 1978, Ms. Helton, together with four supporters who had left their jobs with Respondent, began picketing in front of the Restaurant. At one point during the picketing, while the demonstrators were standing in the entrance to the Restaurant parking lot talking to the passengers in a car entering the premises, Sherry Sturgeon, one of Respondent's managers, came out of the Restaurant and ordered the picketers away from the driveway. Angry words were exchanged between the parties. There is no evidence that this incident was observed by any of the Restaurant employees. Although the picketing continued for several more hours on September 20, and for several days thereafter, there is no evidence that there were other confrontations between Ms. Sturgeon and the demonstrators.

6. Picketing also took place on September 21 and 22, and there is evidence that on occasion the picketers interfered with customer exit and entry, argued with Respondent's customers and employees, and were joined in their efforts by additional persons.

7. On September 22, 1978, the third day of picketing, Ms. Helton and her supporters passed out leaflets to customers of the Respondent and to passersby. The leaflets informed the public that the NLRB had issued a complaint against the Restaurant. The leaflets also contained assertions that Ms. Helton had been discharged because of her union activities and that waitresses at the Restaurant had been subjected to "unwarranted sexual advances" and compelled to use a "filthy restroom."

8. On September 25, 1978 Respondent filed a Complaint against Ms. Helton and the other demonstrators in the Superior Court of the State of Arizona, in and for the County of Maricopa. The Complaint prayed for injunctive relief and damages as a result of the alleged unlawful activities of the demonstrators, including wrongful interference with customers and with business operations and the publication of defamatory statements in the leaflets. Among the statements which the Restaurant sought to enjoin were those which "misrepresent[ed] the nature of substance of the matter now pending before the National Labor Relations Board as Case No. 28-CA-4970."

9. The suit was assigned to the Honorable Marilyn A. Riddel, Judge of the Maricopa County Superior Court. On September 25, 1978, Judge Riddel issued a temporary restraining order limiting the demonstrators to four persons at any one of Respondent's restaurants and prohibiting violence, threats of violence, trespass and interference with ingress and egress.

10. On the following day, September 26, 1978, Ms. Helton filed a second charge with the NLRB, alleging that Respondent's lawsuit violated the Act because it "coerced and restrained" employees in the exercise of their rights and was instituted in order to "harass" employees engaged in union activities and "to force them to curtail such activities." On October 3, 1978 this charge was amended to allege also that the lawsuit was instituted in retaliation for the participation of Ms. Helton and her supporters in the previous NLRB proceedings.

11. On October 3, 1978, Don Kalfas, one of the owner-managers of the Restaurant, had a telephone conversation with Sandra Lambertus, a former waitress at the Restaurant whom he had known for many years. During the conversation, on advice of coun-

sel, Mr. Kalfas described to Ms. Lambertus the status of matters before the NLRB and asked her if she was willing to discuss Ms. Helton's charges with the attorney preparing Respondent's defense. When Ms. Lambertus indicated that she did not want to get involved, Mr. Kalfas did not pursue the matter further. He did not ask whether Ms. Lambertus had given a statement to the NLRB, and he did not otherwise inquire into the NLRB investigation. At the end of the conversation, Mr. Kalfas thanked her and wished her and her husband good luck in their new business.

12. On October 23, 1978, the NLRB issued a complaint based on Ms. Helton's second charge. The complaint alleged that Ms. Sturgeon's argument with the picketers on September 20, Mr. Kalfas' phone call to Ms. Lambertus on October 3, and the prosecution of the Respondent's state court lawsuit violated Section 8(a)(1) of the Act by interfering with, restraining and coercing employees in the exercise of their rights under the Act, and violated Section 8(a)(4) of the Act by discriminating against employees for filing charges with or giving testimony to the NLRB.

13. On October 27, 1978, the NLRB filed the instant petition pursuant to Section 10(j) of the Act seeking injunctive relief against Respondent pending final resolution of Ms. Helton's charges.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter under Section 10(j) of the Act, 29 U.S.C. § 160(j).

2. A prerequisite to the granting of the interlocutory injunctive relief sought by the Petitioner under Section 10(j) is a finding by the Court that the NLRB has reasonable cause to believe that the Respondent has committed an unfair labor practice in violation of the Act. *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 36 (2nd Cir. 1975); *Angle v. Sacks*, 382 F.2d 655, 658 (10th Cir. 1967); *Panello v. International Union, UMW*, 88 F. Supp 935, 938 (D.D.C. 1950).

3. In meeting this test, the NLRB need not prove that the unfair labor practice was in fact committed, but it must establish that the legal theories it has applied to the available facts are not insubstantial or frivolous. *Boire v. International Bhd. of Teamsters,*

479 F.2d 778, 796 (5th Cir. 1973); *Schauffler v. Local 1291, ILA*, 292 F.2d 182, 187-88 (3d Cir. 1961).

4. This Court concludes, as a matter of law, that the NLRB has not shown reasonable cause to believe that Respondent has committed an unfair labor practice. The two incidents offered by the Petitioner as evidence that Respondent interfered with, restrained or coerced its employees in the exercise of their rights under the Act — Sherry Sturgeon's one confrontation with the picketers on September 20, and Don Kalfas' single telephone call to Sandra Lambertus on October 3 — cannot fairly be considered coercive within the meaning of the Act. In any event, even if these two incidents were coercive, they were isolated and insignificant and, as such, constitute insufficient evidence to warrant an NLRB finding that an unfair labor practice has occurred. *NLRB v. Grunwald-Marx, Inc.*, 290 F.2d 210 (9th Cir. 1961); *Dierks Forests, Inc. v. NLRB*, 385 F.2d 48, 51 (8th Cir. 1967); *Caribe General Electric, Inc. v. NLRB*, 357 F.2d 664, 666 (1st Cir. 1966); *NLRB v. Mississippi Prods., Inc.*, 213 F.2d 670, 674 (5th Cir. 1954).

5. The Court further finds that, based on the evidence, the Petitioner had no reasonable cause to believe that Respondent filed its lawsuit in the state court for a coercive or discriminatory purpose within the meaning of the Act, or that in so doing Respondent intended to interfere with the NLRB processes. In any event, the filing of a civil suit by an employer against his employees does not constitute an unfair labor practice, despite the incidental coercive effect upon employees' statutory rights. *Bergman v. NLRB*, 577 F.2d 100, 103 (9th Cir. 1978); *Clyde Taylor Co.*, 127 N.L.R.B. 103 (1960).

6. An exception to this general rule is made when the suit seeks an unlawful objective, as, for example, when a union sues to enforce an unlawful contract. *Booster Lodge 405, IAM v. NLRB*, 412 U.S. 84 (1973); *International Org. of Masters, Mates & Pilots v. NLRB*, 575 F.2d 896 (D.C. Cir. 1978); *United Stanford Employees, Local 680*, 232 N.L.R.B. No. 49 (1977). No such unlawful objective was sought in the instant case.

7. On its face, the Respondent's lawsuit does have lawful objectives. With respect to the first cause of action, it is well established that an employer has the right to seek an injunction and

damages against trespass, mass and non-peaceful picketing, and interference with customer entry and with business operations. *UAW v. Wisconsin Employment Relations Board*, 351 U.S. 266, 274-75 (1956); *Alesna v. Rice*, 74 F. Supp. 865 (Haw. 1947), *aff'd*, 172 F.2d 176 (9th Cir.), *cert. denied*, 338 U.S. 814 (1949).

8. With respect to the Respondent's cause of action based on libel, it is sufficient to note that the NLRB itself has ruled that an employer's slander suit against an employee does not constitute an unfair labor practice. *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977). Furthermore, the U.S. Supreme Court has held that state court jurisdiction over libel claims is not preempted by the National Labor Relations Act when such claims arise in the context of a labor dispute. *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977); *Linn v. United Plant General* [sic] *Workers*, 383 U.S. 53 (1966).

9. Although Respondent's discovery in the state court suit elicited some responses which may have relevance to the proceedings before the Board, the discovery was also relevant to the state litigation and thus proper. *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973); *Deering Milliken Research Corp. v. Leesona Corp.*, 27 F.R.D. 440, 441 (E.D.N.Y. 1961); 4 Moore's Federal Practice ¶26.54 at p. 26–105 (2d ed. 1976). The state court judge ordered Respondent not to engage in discovery regarding statements made by witnesses to the NLRB, and the Respondent complied with that order. The case is thus distinguishable from *NLRB v. Robbins Tire & Rubber Co.*, 434 U.S. 1061 (1978).

10. Since the NLRB had no reasonable cause to believe that Respondent committed an unfair labor practice by filing its lawsuit, the granting of an injunction prohibiting the Respondent from prosecuting the suit would be improper under the "just and proper" criteria of Section 10(j) of the Act.

DATED: January 22, 1979

/s/ Walter E. Craig

United States District Judge

A copy of the foregoing hand delivered
this 9th day of January, 1979, to:

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Lawrence Allen Katz

LAWRENCE ALLEN KATZ,
Attorney for Respondent

ORDER issued in Bill Johnson's Restaurants, Inc. v. Helton, *et. al.*, C375470, Superior Court, Maricopa County, Ariz., Mar. 15, 1979

[Caption deleted]

Having been under advisement and the Court having reviewed the written and oral arguments of counsel and the authorities cited in light of the record to date,

IT IS ORDERED dismissing the abuse of process count in the counterclaim and leaving the libel claim for trial.

FURTHER ORDERED granting the Defendants' Motion for Summary Judgment as to the business interference claim of the complaint but leaving the business disparagement (libel) count for trial.